No. 2879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK P. McKINNEY, as Receiver of the OLYMPIA BANK & TRUST COMPANY, a Corporation, Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appellees,

and

C. S. REINHART and C. WILL SHAFFER, Stockholders of OLYMPIA BANK & TRUST COMPANY, a Corporation, for Themselves and All Other Stockholders of said Company, Appellants,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appellees,

and

ROY A. LANGLEY, as Receiver of the STATE BANK OF TENINO,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appellees,

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APPELLEES' SUPPLEMENTAL BRIEF IN REPLY TO REPLY BRIEF OF APPELLANTS.

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Appellants and intervenors, many of whose statements in the opening brief we were reluctantly com-

pelled to take sharp issue with and call to the court's attention as unfair, now, in their reply brief, charge us with falsely stating and misquoting the record, citing forty-five numbered instances of such alleged wrongdoing on our part.

We respectfully request the court's particular attention to these. Even a brief examination of the appellants' reply brief and of appellees' brief in connection with the record will disclose that the charges made are wholly unjustified and in most instances are not even attempted to be justified. Take, for instance, the following:

> "3. Hayes came from Montana voluntarily to testify as a witness for appellant."

We made the above statement in our brief. If it is a false statement, surely we are subject to the severest censure or to the discipline of the court, and our opponents' language is justified. Is it shown, then, that this statement is false? No such attempt is made by our opponents. On the contrary (p. 11) counsel admit that no subpoena was issued for Mr. Hays, while the record shows that he did come from Montana voluntarily to testify for appellant. (Supp. Tr. 235.) Our opponents are contented with making the statement, entirely incorrect, that Hays no longer had any interest in the bank, though there is not a word in the record to that effect, while the whole record dis-

closes that he has at all times been the largest stockholder and would have been the principal beneficiary in case appellants' claims had been sustained.

Passing over alleged false statements based on admittedly conflicting testimony which, plainly justified by the testimony on which the trial court based its decision, should not we think be made a basis for a charge against counsel of making false statements to the court, we ask your honors to observe the following:

> "7. That Gilchrist was to be made an officer in the Olympia Bank & Trust Company."

The statement in our brief is

> "It seems that Gilchrist was to be made an officer in the Olympia Bank & Trust Company,"

referring to page 560 of the typewritten transcript. Do our learned opponents claim that this statement is untrue or that it is not based on the testimony? Not at all. They merely say that nobody except Hays testified to that effect, and that Hays, though organizer and majority stockholder in the Olympia bank, "couldn't promise who should be its officers," yet the intervenor Reinhart himself, the president of the Olympia bank, admits (Supp. Tr. 245) that he and everybody else "regarded Mr. Hays practically as the Olympia Bank & Trust Company, leaving it to him to handle and manage it and make its financial arrangements."

We think that members of the bar of this court

do themselves and the court injustice when they make and call upon us to meet so groundless a charge of misstatement.

The next item is

> "8. That the corporate stock of the Olympia Bank & Trust Company was charged on books of the United States National Bank,"

referring to page 9 of our brief. If your honors will turn to the page indicated of appellees' brief, you will observe that our statement is that the "corporate stock of the newly organized Olympia Bank & Trust Company was charged on *its* books," that is to say, on the books of the Olympia Bank & Trust Company to United States National Bank. This indisputable fact forms the very basis of our argument that while the directors of our bank had no notice of the relations between the two banks owing to the fact that the transaction appeared on our books merely as an ordinary remittance, the directors of the Olympia bank had notice *from their own books* of the real nature of the transaction. This is sufficient to bind them.

> *First National Bank vs. Tisdale,* 84 N. Y. 655.
> *Mamerow vs. National Lead Co.,* 69 N. E. 504, 508 (Ill.).

The alleged erroneous statements, Nos. 9 and 10, are substantially undisputed. The first is clearly and indisputably shown by the books, as well as by the testimony of the only witness who was called upon the

point, and this is admitted by our opponents. That the $12,500 shown on the books might conceivably have been some other items as to which no testimony was offered is not a reasonable suggestion, unless learned counsel for appellants think that this court should reverse the court below for not assuming in favor of plaintiff that the state of facts is the opposite of that shown by the record in regard to the matter.

The tenth statement, that the directors of the United States National Bank did not know the dealings of Hays until September 14th, is absolutely undisputed on the record. The undisputed testimony shows that the conspirators, Gilchrist and Daubney, successfully concealed this corrupt and disgraceful transaction which our opponents now in desperation seek to defend, until September 14th, when their fellow-directors first discovered it. (See appellees' brief.) In this connection the entire change of front of appellants' counsel would be an extraordinary thing to note. On page 25 of our opponents' reply brief will be found the statement, "Undoubtedly they (the directors of the United States National Bank) did not know of any unlawful dealings between Hays and Gilchrist, because these unlawful dealings was a theory that was hatched to defeat us." Let the court note that the very appellants who now seriously ask this court to believe that there was no illegality, wrong or fraud in the rela-

in the form of drafts by the Olympia Bank, in their own sworn complaint, shown on page 24 of the printed record, say *"That the said credit thus given the said W. Dean Hays* (the $50,000 sham credit) *was a book credit only and by the terms of said agreement between the said W. Dean Hays and the said Charles S. Gilchrist, the funds represented by said credit were not subject to withdrawal by the said W. Dean Hays or the said Olympia Bank & Trust Company; that the said secret agreement constituted a fraud on the rights of said Olympia Bank & Trust Company* and the creditors, stockholders and officers thereof on account of the conditions herein alleged and on account of the insolvent condition of said United States National Bank of Centralia; *that in furtherance and fulfillment of said fraudulent and secret agreement,"* etc.

Curious indeed is the situation in which counsel would place us, for, in the lower court, intervenors go to trial upon a complaint alleging that the $50,000 credit was a sham or *paper credit only.* The appellant receiver states in the trial court that there is no issue between plaintiff and intervenors, and the case is presented and argued by the same counsel. Then, in this court, both plaintiffs and intervenors *say that the theory that the credit was a sham credit and the*

ents is "that there was ground for suspicion that Hays had destroyed his notes." This is a statement of opinion, and is, we think, well founded, though a matter not substantially material to the issue.

The twelfth alleged false statement is "that intervenors accepted the tender of the notes of the stockholders other than Hays," referring to page 11 of our brief. This is a simple, plain, indisputable fact occurring in the course of the trial and shown by the stenographic transcript, though wholly omitted from the condensed record. There can be no question about the fact. Our opponents in their reply brief do not dispute it. To charge that this is a misstatement can only aid appellants in case the court should overlook the fact in the record and accept at its face counsel's word in their reply brief alleging this as a misstatement.

The next two statements referred to relate to propositions of law and conclusions as to the effect of the entire testimony. We are content to submit the correctness of our intentions on these points to the consideration of this court on the argument contained in the original brief.

testimony of Hays and the record of the Olympia bank prove this fact. Gilchrist was under the impression that perhaps only three-fourths of the stock was put up. Our contention is that the stock was not put up as collateral, but was the basis of a sham credit which, if it had been a real credit, would have been a subscription to or payment of capital stock of the Olympia bank.

No. 19 puts in our mouths a statement which we have never made, and illustrates merely a misreading of our brief by our opponents. As a part of the corrupt agreement with Gilchrist he was promised a position as an officer of the Olympia bank. No one claims that he told his fellow-directors of this fact. He *concealed* it from them.

"21." It is alleged that we falsely state "that the stockholders of the Olympia Bank & Trust Company authorized Hays to make all its financial arrangements." On this point the president of the Olympia bank, intervenor Reinhart, says in cross-examination by us (Supp. Tr. 245):

> "Q. *You and everybody else regarded Mr. Hays practically as the Olympia Bank & Trust Company, isn't that so, leaving it to him to handle it and to make its financial arrangements?"*
> A. *Yes."*

United States National Bank was ever brought to the attention of the State Bank Examiner or otherwise actually used."

This statement is like the other statements of fact in our brief, absolutely correct. On pages 34 and 35 of the reply brief our opponents twist this into a statement that the certificate was never officially used or seen by anybody except Hays, and then say:

"This he knows to be an incorrect statement."

There is no evidence that the certificate or affidavit was ever brought to the attention of the State Bank Examiner or otherwise actually used, but we unqualifiedly contradict counsel's statement that we know that the certificate was brought to the attention of the Bank Examiner or was used. We have no knowledge or information whatsoever with regard to the matter. Counsel for defendants naturally supposed that the State Bank Examiner would be called by plaintiff and that defendants would have opportunity to cross-examine him as to representations made to them by the intervenors with regard to the financing of the Olympia bank. Apparently appellants were afraid to call the Bank Examiner. The statement that the certificate referred to was on file in the State Bank Examiner's office finds no support in the record, and its

quirements of the pamphlet purporting to contain an enumeration of the evidence necessary to satisfy the State Bank Examiner on these points, as quoted in appellants' reply brief, could, of course, be waived by the Bank Examiner, and in the absence of proof on the subject we think it plain that no inference can be drawn that this particular certificate was used.

> "23. That the recovery sought in this action is unnecessary to meet the claims of all depositors."

This statement is indisputably true, as shown in our original brief. Even the statement, arguments, and statements outside the record, contained in the present reply brief, the correctness of which we utterly deny, show that the relief sought is far and away in excess of any needs of the Olympia bank for the payment of the creditors, and that such relief would principally benefit Hays and the other fraudulent or grossly negligent incorporators of the Olympia institution.

No. 24 relates to the cancellation of a part of the sham credit. It is covered by our original brief, which we think fully discloses our position in defense of the ruling of the trial court that the drafts, not having been paid in cash but only used as a basis of a nominal

opponents, and is shown to be correct by the admitted statement of accounts between the two banks.

Statement No. 26 that the other stockholders of the Olympia Bank & Trust Company knew of Hays' transaction with Gilchrist as referred to on page 34 of our brief purports to be only a statement of hypothesis, not a statement of fact. In our principal brief, however, we think we have made it clear that the stockholders of the Olympia bank were put on notice of the wrongful character of the transaction.

The facts showing the correctness of statements 27, 28, 29, 30 and 31 have been set forth in detail in the brief of appellees already filed, as have the facts on which we base the conclusion stated in what appellants call "Misstatement No. 32" that neither the intervenors nor the Olympia Bank & Trust Company come into this court with clean hands.

With regard to the payment of all claims for state funds on deposit in the Olympia bank ("Misstatements" Nos. 29 to 31), we have no knowledge as to the matters alleged by counsel outside the record. The testimony is that these claims have all been paid. If counsel for appellants desired to show the contrary, he should have offered evidence to that effect before

case.

Statement No. 33 is not made by us as the court will observe by turning to the page referred to. We suppose counsel intends to refer to our statement that the stockholders and trustees and officers of the Olympia bank by gross negligence and breach of duty made it possible for the fraud and knavery evidenced in this case to be perpetrated, a conclusion which we submit the whole record abundantly sustains.

The correctness of the remaining statements will be found fully established by the citations contained in our former brief, and we will forbear wearying the court with further discussion of them. Though several of our statements are very much misquoted by our opponents there is not one of the statements actually made in our brief which we desire to change in any manner. As to "misstatement" No. 37, we refer the court particularly to pages 51 and 81 of appellees' brief where this $24,050 note is discussed; also the discussion under No. 44, *post*.

The last five statements attributed to us by opponents and alleged to be untrue are typical of all the rest.

No. 41, to the effect "that the Olympia bank never

our opponents tacitly admit as much, remarking that banks "have a loose way of doing business," and assume without citation of the record that the *Tenino bank* acknowledged the credit as having come from Centralia by notifying Centralia. We know of nothing in the record justifying counsel's statement to this effect, but do call attention to the fact that the remittance of $4,000 involved here was credited to Olympia, not to Centralia, on the books of the Tenino bank itself. (Tr. 64.) The fact is, of course, utterly inconsistent with Tenino's having credited this item to Centralia or so notified us.

No. 42 is a pure proposition of law, and one based on legal principles which, since the preparation of our former brief, have been again announced by this court as governing in a similar situation in the case of *Titlow, Receiver, vs. City of Centralia,* decided February 13, 1917.

No. 43 is an inaccurate statement or half truth which does not reflect our language. As shown on the page of our brief referred to under this item, the fact is that appellant intervenors asked for and received in open court the notes referred to, while represented by the same counsel as plaintiff and stating

Item No. 44 is based squarely on the undisputed statement of account between the two banks and the books of the United States National Bank itself, which clearly show (Plffs.' Ex. 5, Tr. 158) that this note was never transferred, and on the testimony of Gilchrist that the note in question was by him returned to Hays at the demand of Director Dysart. Taking counsel's statement in this regard as provocation, we think that we may perhaps be justified in going outside the record so far as to say that opposing counsel well know that this note is not and never has been received by the Union Loan & Trust Company. If it had been, however, it would have been without its ever having gone through the United States National Bank, thus leaving not even a sham or a shadow of consideration for the false credit originally purported to be extended to the Olympia institution by Gilchrist.

Statement No. 45 "that Gilchrist was not an officer in the Union Loan & Trust Company" is squarely shown by the record as cited in our original brief.

This completes a list of groundless accusations of misrepresentation which we hope and believe has never been exceeded in any case presented before this court.

by the express permission of this court, we have in our briefs referred to upon points in which we conceive the printed record to be incomplete or misleading, is referred to by us as the supplemental transcript. At the time of the preparation of appellants' brief we prepared a detailed commentary on the errors, omissions, and misstatements of the printed record, with appropriate citations to the supplemental transcript, but in view of the somewhat lengthy brief which we found it necessary to offer in order to present the respondents' case, and the fact that the errors and omissions of the printed record were necessarily developed in a discussion of the points at issue, we deemed it unnecessary to ask the attention of the court to further comment on these points.

In appellees' brief, at pages 56, 76, 77, 78 and 79, we called attention to certain of the omissions and misstatements in the printed record, and the list might be extended almost *ad infinitum*. But we believe that the testimony called attention to in our former brief as omitted or erroneously stated in the printed transcript, sufficiently shows the necessity for reference to the complete transcript of testimony, in order to avoid the court's being misled as to the evidence. If, however, the court for this or other purposes desires

misstatements in the condensed record which we prepared, but omitted from our former brief, in the belief that the court, in giving us leave to call attention to such portions of the transcript of the testimony as were omitted in the printed record, desired that we take up the time of the court with as little as possible of criticism of the condensation.

Corrections of Appellees' Brief

While we find the objections of our opponents to the statements in our former brief unfounded, in rereading it we observe the following corrections and additions:

1. On page 21 the third paragraph is by mistake printed in solid formation as if it were a part of the previous quotation. It should be set up in the same manner as the next succeeding paragraph, being our statement and not a quotation from the testimony.

2. At the foot of page 58, the following should be added:

> "$4,000 was credited to Olympia on the very books of the Tenino bank itself." (Tr. 64.)

We desire also to call the court's attention to an additional authority upon the point that the interven-

In *Spencer vs. Alki Point Transportation Company*, 53 Wash. 77 at p. 83,

the court held, quoting from an earlier case:

> "The receiver of an insolvent corporation represents not only the corporation but also the stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons."

An appeal by stockholders who had intervened in a receivership proceeding was dismissed.

Respectfully submitted,

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